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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME MARTIN,

Defendant and Appellant.

B280393

(Los Angeles County
Super. Ct. No. MA068140)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed in part, remanded in part.

Rudolph J. Alejo for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

A jury convicted Jaime Martin (“defendant”) of criminal threats and assault by means likely to achieve great bodily injury. Applying the Three Strikes law (Pen. Code, §§ 1170.12, subds. (b)-(j), 667, subds. (a)-(d))¹, the trial court sentenced defendant to concurrent prison sentences of 30 years to life for each crime. On appeal, defendant argues that (1) the trial court abused its discretion in denying his motion to dismiss his two prior “strikes,” (2) his resulting 30-year sentences constitute cruel and unusual punishment, and (3) he is entitled to remand for a new sentencing hearing pursuant to recently enacted Senate Bill 1393 that grants trial courts the discretion to dismiss prior “serious” felony allegations.² Only the last claim has merit. Because we are unable to say that there is “no reasonable possibility” that the trial court would decline to exercise its newfound sentencing discretion, we vacate the judgment and remand for a new sentencing hearing.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Robberies in 2002*

Around 10 p.m. on a Wednesday night in November 2001, defendant came up behind two men in an apartment’s parking lot. He pulled out a gun, and demanded, “Give me your wallets and your money.” When one of the men said he had no money, he took both men’s jewelry. A few minutes later, defendant walked

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant also argues that the trial court erred in impermissibly imposing *two* five-year enhancements on each crime, but the court subsequently resentenced defendant and imposed only one five-year enhancement.

up behind a woman, pulled out a gun, and demanded her money. She gave him the contents of her purse.

For these crimes, defendant was convicted of two counts of robbery (§ 211) along with an enhancement for personal use of a firearm (§ 12022.5, subd. (a)(1)). In 2002, he was sentenced to state prison for 10 years. Defendant was on parole from 2011 to 2013.

B. *Current charges*

In March 2016, defendant approached a teenage boy as the boy got out of his parents' car to open the driveway gate to the long-term hotel where the boy and his family lived. Defendant was carrying an oval-shaped rock approximately eight to nine inches across. He told the boy, "Today it's rocks and tomorrow it's bullets."

Defendant walked over to one of the nearby apartments and knocked on the door using the rock. A young woman came to the door. When the woman's father came to the door and asked her to call the police, defendant became "furious" and said, "The police can grab my dick." Defendant then raised his arm as if to throw the rock and, with the rock in his hand, told the father, "I'm going to kill you."

At that moment, the teenage boy's father got out of the car and approached defendant, urging him to put the rock down and to relax. When the boy's father was about six to ten feet away from defendant, defendant said, "I'm also going to fuck you over" and threw the rock at the man's head. The man ducked, and the rock struck him on the shoulder before slamming into a wall behind him and breaking into several smaller pieces. The rock hit with enough force to bruise the man's shoulder and to damage the wall behind him.

At that point, a melee broke out between defendant, the two fathers, and their families. Defendant ended up sustaining physical injuries in the fight.

Defendant was under the influence of amphetamines, cocaine and marijuana at the time.

II. Procedural Background

A. *The charges*

As pertinent here, the People charged defendant with (1) assault with a deadly weapon for striking the boy's father with the rock (§ 245, subd. (a)(1)), and (2) making criminal threats against the woman's father (§ 422, subd. (a)).³ The People further alleged that each of defendant's two robbery convictions constituted a "strike" within the meaning of the Three Strikes law as well as a prior serious felony (§ 667, subd. (a)) and prior prison terms (§ 667.5, subd. (b)).

B. *Conviction and sentencing*

A jury convicted defendant of the two counts described above. After defendant waived his right to a jury trial on the issue of his prior convictions, the trial court found that defendant had been convicted of both prior "strikes."

Defendant moved the trial court to dismiss the two "strikes" and to sentence him to probation. The trial court denied the motion, citing defendant's "lengthy criminal history."

The trial court imposed concurrent prison sentences of 35 years to life on each of the two counts, compromised of a base

³ The People also charged defendant with four counts of assault by means of force likely to produce great bodily injury against some of the other participants in the subsequent melee (§ 245, subd. (a)(4)) and three additional counts of making criminal threats against some of the other participants in the melee. A jury acquitted defendant of these counts.

sentence of 25 years (which is the sentence for a third “strike”) (§ 667, subd. (e)(2)(A)), plus five years for *each* robbery as a prior serious felony (§ 667, subd. (a)).

C. *Appeal and subsequent sentence modification*

Defendant filed a timely notice of appeal.

In April 2018, the trial court re-sentenced defendant to 30 years to life for each offense, calculated as the same base sentence of 25 years to life but with only *one* five-year enhancement for a “prior serious felony” (rather than *two* such enhancements). Prior to and at that hearing, defendant asked the trial court to “reconsider” his motion to dismiss the prior strikes. The trial court declined, explaining that it was unsure of its jurisdiction to do so at a resentencing hearing and that, even if it had jurisdiction, the court “would not exercise [its] discretion to strike the strikes.” The court went on to note that defendant “had two prior 211’s and within a--roughly about a 14-year time period.”

DISCUSSION

I. *Motion to Dismiss “Strikes”*

A trial court has the discretion to grant a motion to dismiss a “strike” allegation. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 162.) In deciding whether to exercise this discretion, the court is to “consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Carmony* (2004) 33 Cal.4th

367, 377.) There is a “strong presumption” against granting a motion to dismiss a strike. (*Id.* at p. 378.)

Defendant argues that the trial court erred in denying his motion to dismiss the allegations that each of his prior robbery convictions constituted a “strike.” We review this claim for an abuse of discretion (*id.* at p. 373), and conclude that the trial court did not abuse its discretion. Defendant committed two separate incidents of armed robbery in 2001, and within a few years of completing an eight-year prison sentence and two years of parole supervision, again resorted to the threat of violence--and violence itself--when he threatened to kill one person and threw a nine-inch rock at a second person’s head with enough force to damage the wall the rock hit after striking its target’s shoulder. In light of defendant’s demonstrated penchant for engaging in acts involving threatened or actual violence against strangers, he “appears to be ‘an exemplar of the “revolving door” career criminal to whom the Three Strikes law is addressed.” (*Carmony, supra*, 33 Cal.4th at p. 379.) At a minimum, he is not outside the spirit of that law.

Defendant raises five categories of arguments against this conclusion.

First, he argues that the trial court erred in characterizing his criminal history as “lengthy” because his two robbery convictions were sustained in 2002 and were sustained over 15 years ago; because his other prior convictions are misdemeanors; and because other cases affirming Three Strikes sentences have involved defendants with even lengthier criminal histories than his. That the two robbery convictions were sustained at the same time does not undermine their severity because defendant had time after robbing the first victims to make the conscious decision

to approach the second victim (rather than cease his criminal conduct). (See *People v. Vargas* (2014) 59 Cal.4th 635, 646 [noting propriety of counting two crimes as two “strikes” when the defendant “committed more than one act . . . during a continuous course of conduct”].) That the two robbery convictions were sustained over 15 years ago does not render them less egregious due to their remoteness because “defendant had been incarcerated for the vast majority of that period.” (*People v. Daniels* (2009) 176 Cal.App.4th 304, 317.) That defendant also incurred a number of juvenile adjudications and misdemeanor convictions either before or after his two felony robbery convictions does not somehow lessen the gravity of the felonies. If anything, the broader spectrum of defendant’s criminal history reveals a near-continuous line of criminal activity that goes back to defendant’s teenage years, placing him squarely within the heartland of a recidivist statute like the Three Strikes law. And that defendant can cite cases involving defendants with even *lengthier* criminal histories says nothing about whether *his* takes him outside of the spirit of the Three Strikes law; for the reasons described above, it does not.

Second, defendant argues that his current crimes are relatively minor because they only involve “thr[owing] a dirt rock” that hit someone’s shoulder, and making a threat. Legally, this argument lacks merit because our Legislature has deemed the crimes of personally using a deadly weapon to commit an assault and making a criminal threat to be significant enough to designate them as “serious” felonies (and hence “strikes”). (§ 1192.7, subds. (c)(1)(23), (c)(1)(38).) Factually, this argument lacks merit because it minimizes the size of the projectile defendant threw and the force with which he threw it, ignores

that defendant threw it at the victim's head, and capitalizes on the fortuity that the victim mitigated any harm by ducking (mostly) out of the way.

Third, defendant argues he has already suffered some punishment by virtue of getting beat up in the ensuing melee. That defendant ended up losing the fight he picked does not somehow lessen the severity of defendant's significant felonious conduct that preceded--and, indeed, started--that fight.

Fourth, defendant argues his sentence will be much lower if the motion to dismiss the strikes is granted. This is true, but it is true for *every* motion to dismiss and thus cannot provide a basis for departing from the Three Strikes scheme.

Lastly, defendant argues that he is automatically entitled to a remand because the trial court, during the April 2018 re-sentencing, initially stated it lacked authority to consider defendant's renewed motion to dismiss his "strikes" for purposes of the Three Strikes law, and later stated that defendant "had two prior 211's and within a-- roughly about a 14-year time period." No remand is required. The trial court's initial concern about lacking jurisdiction does not provide a basis for reversal and remand because the court went on to say it would deny the motion even if it had jurisdiction to do so. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944 (*Fuhrman*) ["[R]emand is not required where the trial court's comments indicate that even if it had authority to strike a prior felony conviction . . . it would decline to do so."]) Contrary to what defendant suggests, it is not at all clear that the trial court's statement that defendant had "two prior 211's within . . . roughly about a 14-year time period" is factually inaccurate because both convictions *were* within the same year, and thus within the same "14-year time period." But

even if we assume the statement was not factually accurate, a remand would be pointless: The trial court previously denied the exact same motion on a record containing no factual misstatements, so the result of any remand is a foregone conclusion. (Cf. *People v. Bennett* (1981) 128 Cal.App.3d 354, 359-360 [“remand for resentencing is appropriate” where “the result is [not] a foregone conclusion”].)

II. Cruel And/Or Unusual Punishment

The Eighth Amendment of the federal Constitution prohibits “cruel *and* unusual punishments,” and has been read to contain a “narrow proportionality principle” that forbids extreme sentences that are ““grossly disproportionate”” to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*); *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 (conc. opn. of Kennedy, J.).) California’s prohibition on “cruel *or* unusual punishment” (Cal. Const., art. I, § 17; *People v. Murray* (2012) 203 Cal.App.4th 277, 285, overruled on another ground in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1370), has been read to bar any sentence “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*People v. Boyce* (2014) 59 Cal.4th 672, 721, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424, italics omitted.) California courts examine three criteria in assessing disproportionality: (1) the nature of the offense and offender, with emphasis on his danger to society, (2) the penalty imposed compared with the penalties for more serious crimes in California, and (3) the punishment for the same offense in other jurisdictions. (*People v. Christensen* (2014) 229 Cal.App.4th 781, 806-807.)

Defendant argues that his sentences of 30 years to life for each of his convictions are unconstitutional under the above

stated principles. We review this claim de novo. (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82.)

As a threshold matter, defendant has forfeited his constitutional challenges by not raising them before the trial court. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247.) Defendant responds that, in his motion to dismiss his strike priors, he noted that his sentences were “grossly disproportionate, unduly harsh and frankly unjust.” But defendant made this assertion in the midst of an argument asking the trial court to dismiss the strike under section 1385 and, in conjunction therewith, cited precedent dealing with motions to dismiss; at no point did defendant mention or cite any law dealing with the constitutional prohibitions on cruel and/or unusual punishment.

Defendant’s argument lacks merit in any event. Courts have repeatedly rejected constitutional challenges to sentences imposed under recidivism statutes involving defendants whose current offense and prior convictions were less severe than defendant’s. In *Ewing, supra*, 538 U.S. 11, the United States Supreme Court upheld as constitutional a “third strike” sentence of 25 years to life under California’s Three Strikes law when the defendant’s current offense was stealing three golf clubs. (*Id.* at pp. 24-31.) In *Rummel v. Estelle* (1980) 445 U.S. 263, 265-266, the court upheld as constitutional a “third strike” sentence of life with the possibility of parole when the defendant’s current offense was theft of \$120.75 by false pretenses and his prior two convictions were frauds that obtained \$80 and \$28.36 worth of goods. (Accord *People v. Romero* (2002) 99 Cal.App.4th 1418, 1422-1423 [rejecting constitutional challenge to 25-year-to-life sentence under Three Strikes law when current conviction was

for stealing a magazine].) Against this backdrop, a sentence of 30 years to life for a defendant who has committed two armed robberies, threatened to kill someone, and assaulted someone else with a deadly weapon is neither cruel nor unusual.

For support, defendant cites *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*). But *Solem*'s mode of legal analysis was overruled in *Harmelin v. Michigan* (1991) 501 U.S. 957, 965. And *Solem* is factually inapt in any event. There, the court held that a sentence of life without the possibility of parole, imposed pursuant to a recidivist statute, was constitutionally excessive when imposed upon a defendant whose prior crimes were felonies that were "minor, "nonviolent" and did not involve a "crime against a person." (*Solem*, at pp. 296-297.) Suffice it to say, defendant's past and present crimes do not fall into any of those categories.

III. Remand for Resentencing Per Senate Bill 1393

On September 30, 2018, the Governor signed Senate Bill 1393, which amends section 1385 to eliminate the prohibition on dismissing prior "serious" felony conviction allegations under section 667, subd. (a). (§ 1385, subd. (b) (2018 ed.); Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 2.) Because this new law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless the Legislature has expressed a contrary intent. (*People v. Francis* (1969) 71 Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Our Legislature has expressed no such intent in Senate Bill 1393. Because defendant's conviction is not final, he is entitled to have the trial court exercise its newfound discretion whether to strike the two prior "serious" felony allegations unless the court, during the original sentencing, "clearly indicated . . .

that it would not . . . have stricken” those allegations if it had been aware of having the discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, there is no such indication. The court made no express statements to that effect, and its decision to run the sentences for the two counts of conviction concurrently (rather than consecutively) shows that the trial court was not intent upon imposing the longest sentence possible. On these facts, a remand is appropriate.

DISPOSITION

The case is remanded for resentencing to allow the trial court to consider whether the enhancements under section 667, subd. (a)(1) should be stricken pursuant to Senate Bill 1393. Upon resentencing, the trial court is directed to prepare an amended abstract judgment and forward a certified copy of it to the Department of Correction and Rehabilitation. The judgment is otherwise affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ